

THE
GREAT CASE
OF THE
JUSTICES

Stated and Determined,
TOUCHING
Their Duty of putting the
Laws in Execution, whether
Dissenters were Indulg'd, or Not.

OR,
A DISCOURSE con-
cerning the OATH of the
Justice of Peace, explain-
ing the Extent of its Obliga-
tion: Being a Case univer-
sally reasonable, in regard to
Righteousness, Peace, and the
Prosperity of this Nation.

Published with Allowance.

London, Printed by W. D. and are
to be Sold by Randal Taylor. 1688.

GRATIA

TESTES



A DISCOURSE

concerning the OATH of the
University of Cambridge, taken
ing the ancient and obligat-
tion: Being a Case univer-
sally reasonable in regard to
Rights, Liberties, Privileges, and the
Property of the Nation.

Printed in the University of Cambridge.

Printed by W. D. and
to be sold by Andrew, 1701.

THE
PREFACE.

READER,

If there were no Ju-
stices of the
Peace, through the
Land, who do believe in
their Consciences, That
there still lies an Ob-
liga-

The Preface.

~~litigation upon them,~~
to the Execution of
the Statutes of the
Realm, having once
Sworn thereunto,
notwithstanding the
King's Declarati-
on for Indulgence,
(being short of a
Law); so that upon
Supposition an Infor-
mation was Legally
brought,

The Preface.

brought, they could
not forbear doing as
they did formerly,
without having an Ill
Conscience: And if
there were no Volu-
bility in Humane
Affairs, to Disturb
the Dissenters in the
Possession of their pre-
sent Freedom, but
that they might think
A 3 them-

The Preface.

themselves so Safe and
Inviolable, as to be out
of Fear, That what
Hath been, May be
again: Yet were it a
thing insufferable, for
a Dissertation upon
this Subject, which is
so Elaborate, (being
Written with such
Care, in weighing e-
verything it sets down,
with

The Preface.

with so much feeling
Tenderness, and
pondered Moderati-
on; with such an A-
cumen, yet Calm-
ness of Stile; and
which hath been so well
Advised, and Super-
vised by the most Judi-
cious of any I know), to
be Cast away, and be-
come as Water spilt
on

The Preface.

on the Ground,
which cannot be
gathered up. But if,
on the contrary, there
be many Justices of
that Perswasion, and
amongst a new set of
Aldermen and Ju-
stices, there are some
likely to be more Ten-
der in a point of
Conscience, than
They;

The Preface.

They, then must this
Discourse do not
(totally) Necessary at
present, in regard to
Such. And if the Fire
that is pent up, does
but Burn more vehe-
mently, so that when
the Indignation breaks
out, it is likely to rage
more furiously for the
Restraint. And if the
Lives

The Preface.

Lives of Princes (e-
specially when they are
Benign and Good)
are not certain to be
longer, than those
Mortals; Besides, a
multitude of other Ac-
cidents of Life, that
go to the turning about
that Wheel, which
maketh those Persons
and Things, that are
at

The Preface

as the Top now, so he
like to be at the Bot-
tom again, at ano-
ther Season; I doubt
it seem Convenient
also for Others, that
will imitate the Pro-
vident Householder,
who sets down a Profi-
table Receipt in his
Book, for an Occasion
hereafter; though, at
-IIA pre-

The Preface

presenting to the reader of
this Family a book which
of late in many most
difficult cases (Readers)
is a Case of very great
importance and difficulty
to the Determination
of the Single Law, (for
as we have seen) before
judging and interpreting it
is hard to see what it
will be (and) it is a book

The Preface.

Author has so managed it, laying his Foundation so sure, as he goes; and then raising his Structure so evenly upon it, that what is Difficult, he hath made appear Easie; and that which is Peculiar, he hath made appear as Common; so that every
a * Body

The Preface.

Body will be ready to say He would have determined the Point just so himself; when there is a great deal more Study, Learning, and Judgment goes into the Matter than comes to Another's share to be Master of.

I will note a few things. There is one short

The Preface.

short Paragraph in
the Book, (let the
Reader find it him-
self) which states that
Ticklish Point of the
King's Power about
the Laws. He has
written so Castigately
on it, distinguishing the
Negative and Po-
sitive Power, and
offering his Notion

The Preface.

in regard to the Publick Good, (the Supreme Law), that, I think, so compendious and clear a Determination is not any where else to be found. I will by way of Confirmation thereof, add this Story. Not long before the Death of the Late King, the Justices

were

The Preface.

were sending Mr. Richard Baxter to Prison; but He, out of his kind Nature, (being told, That it would kill the good Man) sent word immediately he should be forborn. Should the King have Controuled the Law to his Hart; it had been Tyranny;

The Preface.

ranny; but when it was
done only for his Good,
without hurt to any, who
is there will not justify
the King's assuming
Power over Law and
Justices both, in that
matter? To Usurp
Authority over the
Law, only for the sake
of a Man's self, as to
take our Money with-
out

The Preface.

out a Parliament,
were the greatest La-
trociny; and which
our King does abhor
(who hath declared for
his Subjects Proper-
ty, as well as Liber-
ty): But for a King
to declare his Plea-
sure, that He will have
all his Subjects be
Happy, and Enjoy
their

The Preface.

their Consciences,
so long as the Publick
receives no Detriment
by it; and to that end
will forbear to Ex-
ecute such and such
a Particular Law or
Laws, which appears
to him prejudicial
thereunto; I must say,
after this Grave Au-
thor, That this be-
ing

The Preface.

ing a thing altogether
for the Welfare of his
People, and not for
his Personal Bene-
fit, He must be said to
Govern still Accor-
ding to Law, seeing
He does Act by the Su-
pream Law, to which
all Others are Subor-
dinate, according to
the Profound Deter-
mina-

The Preface.

mination of that Paragraph.

Another thing I will note, in regard to the Candor of this Gentleman, who no doubt, does Write in Favour of the Dissenters, & could not be pleased with any Cause or Party, who were for Persecution; Yet
does

The Preface.

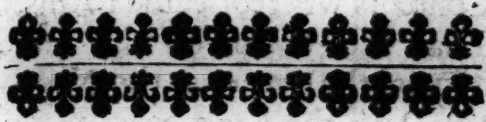
does he very purposely,
Vindicate the Church
of England, her Li-
turgy, and the Law,
from the abuse of such
Justices and cursed
Informers, who (as
they dealt with many
People) did make them
worse than Mahu-
matism; while they
pressed Them only to
mili-

The Preface.

*militate against the
Sober Exercise of the
the unquestionable du-
ties of Christianity.
This Author will not
have That which is
barely the Fault of the
One, to be Imputed to
the Other.*

*Reader, I have no room to
proceed to any further Note; but
commit this Piece to Thy Hands,
as a Jewel in my Opinion.*

THE



T H E

Justices CASE.

T H E R E was a Book
 (I cannot tell just
 how many Years a-
 goe, but it was at a
 time, I remember, when the
Fanaticks were not troubled)
 which, together with some o-
 ther Books, was put out *de in-*
dustria, toward the raising a
 Storm upon such People: the
 B Con-

2 *The Justices Case.*

Contents whereof came to this,
That the *Oaths* of the late
Times, the *Covenant*, the *Nega-
tive Oath*, the *Engagement*, were
unlawful, and not to be kept;
but the *Oath* which the *Justices
of Peace* take, is unquestionable,
and must oblige: And if they
do not therefore Execute the
Law to their utmost upon the
Dissenter, they are Perjur'd Per-
sons; and must every Man of
them, for ought I could see by
that Book, be inevitably Damn'd.

I am very apprehensive, That
His Majesties *Justices of Peace*,
throughout the Realm, are lit-
tle beholding to any Men for
such Discourses. If they were
to

The Justices Case. 3

to be supposed of that profligate Conscience, that they thought they might Swear any thing, and not be obliged to Perform what they Swear, then might such a Book be Serviceable (though not so much, I hope, as barely Reading over the *Third Commandment*): But if there be any thing of Judgment or Discernment required in an undertaking of that Nature, to yield the *Reader* the expected Fruit of establishing his Conscience, if he be a *Justice of the Peace*, (whether *Lord, Knight, Mayor, Alderman, or Gentleman*) I must not wish any Body to seek it from that Book: Of which, as the *Book-*

4 *The Justices Case.*

seller then did not name the *Author*, I will not now rake up the *Title*. Only the Distress of many Serious, Conscientious, Pious *Gentlemen*, that are (or at least have bin, or may be) called to this *Office*, in regard to the *Taking* and *Keeping* that *Oath*, which is then put upon them (in which *Case*, the tender *Constable* also may be included, in regard to *His*) does require a more Candid determination.

In all *Oaths* that are *Promissory* (we are to know) there are some *Conditions* to be supposed, or understood, as the Ground of the Lawfulness
of

The Justices Case. 5

of such *Oaths*, which else could be nothing but *Snares* to any good Men that took them. I do not think it *easy* presently, nor *needful*, to reckon up all such *Conditions*: But as for the Execution of the Laws of the Land, unto which the *Justices* Swear, there is this One most certain, *viz.* That these Laws still be Executed in *Subordination* to the *Supream Authority*. There are several things might be *Instanced*, which a *Justice* is to do according to *Law*; when, upon Command *from Above*, he is to *Surcease*: His Authority is Subordinate to the *King*; and the Laws to Almighty *God*. God now is the *Supream Authority*

B 3 rity

6 *The Justices Case.*

riety in the World; and consequently, there is no Man takes such an *Oath* to see the *Laws Executed*, but it must be understood with Subordination to the Authority of *Heaven*, as that of the *King*. If therefore there be any thing in the *Laws of the Land*, that will not stand with our Duty to *God*, according to the Law of *Nature*, or his Revealed *Word*, the *Justice* is to be supposed that he Sware not to Execute *That*; but this *Salvo* is to be understood in his *Oath*, *Saving the Rights of God Almighty, no less than those of the Crown.*

The Ground of this does lye

a little more deep, than every one at first sight does see : which is, That every thing that is such, is not indeed *Law*. That which the *Justice* Swears to *Execute*, is the *Law* : But if this or that particular thing enjoined by *Man*, be disagreeable to the dictates of *Nature*, or the *Scripture*, which both are *God's Will*, such a thing cannot be made *Law*, is no *Law* ; and he is to look to himself, as not Sworn to perform it.

I suppose the *Justice* will readily give his Ear to this, and it is thus confirmed. *Power* is a Right to Command. This Right is the Grant of the Su-
B 4 perior

8 *The Justices Case.*

perious Authority. God is *Supream* of All. He does not grant that a Man, or any Men should *Command* what he *Forbids*. Whatsoever then is disagreeable to his Will, cannot be *Commanded*, that is, cannot be *Law*; and the *Justice* Swears only to Execute *Law*.

I remember, a great while agoe, I applied my self to a *Justice*, to deliver a *Quaker* out of Goal; I found him willing heartily, but he believed he might not, for fear of his *Oath*. I went away, not daring, if he thought so, to press him any more to it, but I thought upon it. I considered it was a hard thing

The Justices Case.

9

thing that Men by the *Law* should be Imprisoned, and kept Year after Year, only for their *Perswasion*. I considered again, that *Goodness* which makes Men like God, the Rule of Righteousness [*Quod tibi non vis fieri, alteri, ne fieris*], the Law of Love, and the Duties especially of *Mercy, Kindness, Gentleness*, (which *Christ* requires of his Followers) did prompt to acts that are *Contrary*. I resolved then, if the *Law* required one thing, and *Christianity* or the *Law of Nature* another, the Law of God must take place; and no *Oath* consequently could bind against *God's Commandment*.

I must confess, it enters my Thoughts now, That *Example* is a thing likewise to come into Consideration with this, as *One End* certainly, though not (according to some) the *only End of Punishment*: And why may not a harmless Person be put to suffer (for Example sake to others) a *single* damage for the *good* of the *whole*? I consider then forward, and as I think that *Punishing the Innocent* is *Malum in se*, and cannot be rendred good by the End, because Punishment supposes a Fault, and a Fault that deserves it; and without which it is unjust: So, think I, to the Magistrate, it is no Fault to be in Heart

Heart a *Quaker*, or of any other *Sect* or *Opinion*, who is not to meddle with the *Judgment* or the *Heart*, that is, with any *inward*, but only the *outward Act*; and the meeting only of any *Innocent Persons*, to *Serve God* in *Their way* (being not *Idolatrous*, or *Intollerably Evil*, as we do meet in *Ours*, that go to *Church*), or *according to their Conscience*, (when it is *Wicked* to force them to another way *against their Consciences*), is no *outward Act* that can deserve any such *Law* to be made against it, but upon *Extrinsical Accounts* or *Considerations*; where the *Wisdom* and *Discernment* of every *Justice of the Peace*

is to be Exercised: And the Issue perhaps will come to this, That according as he believes, the sparing or not sparing such *made Faults* (that is, *Faults* of *Man's* making by *Law*, upon such extrinsical accounts, and not *God's*) to be conducive to those ends (if they be good) he is to be guided in his actions.

Saul binds the People with a Curle, *That they shall not Eat till the Evening*: *Jonathan*, knowing nothing of this, Eats; and upon Lot and Discovery is Commanded to be Slain. The People, for all this *Oath*, will not Execute that Law or Command, but save *Jonathan*. Now
look

The Justices Case. 13

look, what would justifie the People in refusing Obedience to that *Oath*, will acquit the Justice; who upon the same account (for all his *Oath*) does not Execute some Law of the Realm. The People thought it a rash Determination, an unreasonable Sentence, and a Sinful Command against the *Sixth Commandment*, that the Innocent should be Punished. It had been *Murder*, if they had pursued the *Oath*. And upon that account, we are to judge *Saul* reprov'd of his unadvised Curse, and he bound to Repent; but no body to Execute what he had Sworn: And yet all of them, nevertheless, bearing still
C the

the same Faith and Allegiance
to the *Anointed of the Lord.*

If you desire more than this,
I will distinguish in the next
place between the *Law* and the
Reason of it; the *Letter* of the
Law; and the *Purpose* of it, ac-
cording to which it receives its
Construction. If a *Justice of*
Peace does act according to the
Intent and *Reason* of the *Law*, I
do apprehend he does perform
his *Oath* better than if he rigo-
rously stood upon the *Letter*.
Nay, he may contract Guilt
upon himself in the *One*, when
he shall not in the *Other*. The
Law now against the *Dissenter*,
I apprehend to stand in general
upon

The Justices Case. 15

upon this Reason, They would have them come to Church, and secure the Peace of the Nation. If a Justice then apprehend, that the using of Rigour will but drive more from the Church, and enkindle disturbance; I ask, Whether he be most obliged for the observation of his Oath, to Forbearance or Prosecution? Severity, it is true, hath been found a little of late (as it so happened) to have done something: But at another time, with other Persons, where the Conscience is Steel-ed, it hath done, and it can do just nothing, unless where it is Over-Cruel; and that makes Desolation, and at long running,

C 2 doth

doth but widen the breach.
*Solitudinem faciunt, & pacem
vocant.*

Again, Though the *Law* pass
in *Parliament*, the *Executive*
part is committed to the *King*.
I will suppose now a *Prince* to
be of the Mind, that *Tenderness*
is like to be more conducive to
the Good these *Laws* design,
than *Violence*, or to be in his
Judgment against *Persecution*:
I ask then, Whether the *Justice*,
who acts under the *King*, might
not satisfy his Conscience in
this, That he shall, according
as he Judges, by *Indulgence* ra-
ther than by *Rigour*, best com-
ply with the *Will* of the Su-
pream

pream Governour? I remember well, in the time of the late King, That I my self once heard Him, with my own Ears, declare at Council-Board, and that Solemnly, (for he rose up, saying so), *That He was against the Persecuting any for their Consciences.* This I take to have been his *Native Judgment*; and whatsoever his *Adventitious Pradbite* might be, upon the Scene-altering, there are none but must confesse both alike favourable, at the time of his *Declaration to his Loving Subjects*; which is not so many Years past, as to be out of our Remembrance.

Moreover, There are Laws sometimes that wear out of date, as being found disadvantageous; and then, by a general consent, they grow out of use. I do not know but the time may come, that some of these Laws, which have been so fiercely pursued, may appear to be such as turn to no good account; and then, why may not the *Justice* think his Soul obliged, as in case of Laws that were never yet *Repealed*, but are *Obsolete*? There is a Statute, and, I suppose, unrepealed, requiring *All Men under the Age of Threescore, not Spiritual Men, or Justices of the Bench, to keep Bow and Arrows in their Houses.*

But

But is there any *Justice of the Peace* thinks himself bound, for all his *Oath*, to put that Law in Execution? There is another Law for keeping *Crownets*; when what a *Crownet* is, I know no *Justice* or *Lawyer* that understands.

Above all, The Magistrate, according to the Apostle, is appointed by God to be a *Terror to the Evil Doer*, and an *Encouragement to doing well*. When the Execution then of any Law, will render the Magistrate a Punisher of the *Innocent*, instead of the *Wicked*, a *Terror to Well-doing* (such as *Serving God*, and *Walking up-rightly*,

rightly, according to a Mans Conscience, not erring intolerably, is) instead of *Vice* and *Ill-doing*: I do ask, How can the *Justice* be bound by his *Office* to do that which does prevent the *Institution* it self?

But let us suppose a *Justice of Peace*, who is of the mind that the *Dissenters* are ill Men, and their *Conventicles* not to be endured: I pray let me see this *Justice* as Zealous also against Prophaneness, Swearing, Drunkenness, and Debauchery of all sorts, which are Offences against the Law, and alike Punishable by him: or else, if the Man be so *Hot* for Restraining

ing

ing *Meetings*, but *Cold* for Repressing *Vice*, I can hardly think, that what he does is done meerly out of Conscience of his *Oath*.

There is a Law, That a *Non-conformist* may not abide within Five Miles of a *Corporate Town*: What now if his business brings him thither, and he cannot possibly live else? Is this a piece of *Evil-doing*, unto which the Ruler should be a *Terror*? Suppose an *Informers* should come to a *Justice of Peace*, and Swear against a *Brewer* for Brewing with *Hops*: There is a Law made against That, as I have taken it up,
(though

(though it may not be in the ordinary Book of Statutes, which pretends only to Collect those which are *fit for use*), and the Justice Swears, *He will do his Office after the Statutes of the Realm* : I will ask now, Upon what account can any equal Justice dismiss such a *Brewer*, and not Punish him upon that Complaint; but he may, upon the same, dismiss a *Nonconformist*, who is accused of being in a *Corporation*, notwithstanding his *Oath* ? If a thing be not *Evil*, it is against *Righteousness* to Punish it. No *Law* but must give place to *Righteousness*, no *Oath* can bind against it.

I would put it here to the question, Whether the not coming within Five Miles of a Corporation, as the Brewing without the Ingredients of Beer, be matters of that Nature as ought to be brought within the Sanction of a Law, any more than that a Man shall not make Water against a Wall? *Quod non habet rationem publici commodi, non potest præcipi lege humana.* I would make it a Moot Case at the Inns of Court, as well as a Probleme in the Schools. What is unreasonable, methinks, should be against Nature, and cannot be commanded for a Law, seeing Laws are grounded upon Reason. I will not be so bold

bold as to averr, That the Execution of such an Act does Clash with *Magna Charta*, *Nul-
lus liber homo capiatur, impriso-
netur, aut disseisietur de tene-
mento, vel libertatibus utlege-
tur, exulatur, aut aliquo modo
destruatur, nisi per legem Terræ:*

But if it does but clash with that which ought to be the end of every Commandment, (*The end of the Commandment is Cha-
rity*), it will be more certainly enough to take off the obligation from the *Conscience*. See

Dr. Taylor. Duc. Dub. l. 3. c. 1.

¶ 3.

is not commanded to

But I must advance a step farther: I do not apprehend

only,

only, That when the Execution of a *Law* will not consist with the *Law of Nature*, or *God's Word*, that is, with *Religion*, and *Moral Good*, but when it will not stand with that *Political Good* which the *Law* intends, the Magistrate is not in that case to observe it. For, when the *King* and his *Justices* are bound to see the Execution of the *Laws*, they are not to be look'd on as *Blind*, *Brutish* Executioners of them; but that they must judge, of them on necessity, so far as concerns their *own acting* about them. The *King* must judge whether the matter be good for his *passing* the *Law*. The
D King

26 *The Justices Case.*

King and Justices must judge, whether it be still good, as to the Execution. Nay, every single Man must Judge of the Laws made, so far as concerns his own Obeying them; seeing, If he be bound to do nothing that is ill, he must likewise be bound before he does any thing, to satisfy himself whether he does ill or no; as is very honestly said, though in an adverse Book, Entitled, Toleracion Discuss'd; which came out about the same time with the Book, at first intimated, but not named.

By the way, We must upon necessity observe here, the Case being brought on to this state;
That

That the *King*, as well as the *Justice*, is concern'd in it. There is therefore the *Positive* and *Negative* Power of the *King*, and there are matters *Civil* and *Ecclesiastical*. It is true, That the Government of *England*, is Βασιλεία νομική, a Government Regulated by Laws, and that the *King* can *Positively* do nothing but according to Law: But there is this other thing to be known and considered also, That the great Law, the Supreme Law in all Politics, is the *Common Good*. And in the use of that Power which is *Negative*, or in *Suspending his own Act* (which the not permitting a Process in his Name, or the

D 2

grant-

granting a *Nolle prosequi* (I think) is no other) in the Execution of his Government (at least in matters *Ecclesiastical*, wherein he hath all that Authority given him by the *Statute*, as the *Pope* ever had) a Prince is never to be said, *Not to Govern according to Law*, when he does only give Preheminence to *That* which is the *Greatest*, the *Weal* of the *Community*. *Salus Populi Suprema Lex esto.*

And thus much being said in referrence to the *King*, Let any one that please, reason what will follow, in regard to the *Justice*, who is but an Officer

(I

(I suppose) under Him, to act in his stead, and in his Name. If the Magistrate then (to go on), whether *Supream* or *Subordinate*, does judge that such or such a *Law* be good, and good to be executed, that is, That the Execution of it will tend to the *Publick Good*, which is intended in it (as in all Laws it must be), and that it is not inconsistent with *Religion* or *Morality* (in which case the Superiour Law does vacate this), then is he to look to himself, and what he hath Sworn ; knowing that *God* will not hold him *Guiltless*, that beareth the *Sword*, and much less him that taketh his Name also in vain.

But if he judge sincerely in his Conscience, That the Execution will not be for the Good, but rather Hurt to the Government, and the People, (though otherwise the thing be not unlawful), I do apprehend the Execution of his Office, in this case, does lye in the *Non-Execution* of that *Law* (if the Higher Powers be contented), and he shall do his Duty, by leaving such work *undone*. I have heard that some *Judges*, in their Charge to the *Jury*, have given Directions to Prosecute the *Dissenter*, upon One *Statute* of the Queen, and not upon some *Other*; which, in effect, is a suspending that *Law* at present,

The Justices Case. 31

sent, and justifies this Plea.

In the Oath which the Justice takes, for the Executing his Office, the words run thus; *You shall do equal Right to Rich and Poor, after your Cunning, Wit, and Power.* By which Word [*Cunning*] continued from Antient Use, I understand not so much according to the best of a Mans Skill and Knowledge of the Law; which is comprised rather in the Word [*Wit*]; But according to the best of his Discretion, Wisdom, and Prudence; which includes Εμεξεια, i.e. Candor, Moderation, in Cases that require it: That is, *You shall well and truly do*
your

your Office, in Subordination,
 (as I do here more amply express it) to the Laws of God,
Nature, Right Reason, and the
Common Good. Against this
 (if I may use the Apostles
 Word.) *there is* (there can be)
no Law. For,

That the *Common Good* does
 enter the Definition of a *Law*;
 insomuch as if it be not for the
 Good of the People (the *Finis*
jubendi being *Ratio jussorum*) it
 is *secundum Legis Rationem*; no
Law. Let any one please but
 to look first into *Aquinas*, and
 after him, into the *School-men*
 and *Casuists*, as many as he
 will, one after another, he will
 find

The Justices Case. 33

find it to be their common Doctrine; and that delivered (so far as I know) without contradiction. *Omnium commune axioma est de ratione & substantia Legis esse, ut pro communi bono feratur, Suarez de Legibus, l. i. c. 7. Ut Lex subditos obliget, debet esse justa, & utilis Reipublicæ, Sayres Thes. Cas. Consc. p. 119. Lex est ordinatio rationis ad bonum commune ab eo qui curam Communitatis habet promulgata, Thom. 1. 2. Q. 9. Art. 4.* Neither is this the Doctrine only of the Schools in Divinity, but what is asserted by our Lawyers, in point blank terms, for Law. *Laws Positive, which are contrary*

trary to the Law of Nature and Reason, lose their force, and are no Laws at all; Finch's Law, p. 75. The Law of Nature and Reason is unchangeable and perpetual, and no Statute can prevail against it; Doctor and Student, p. 4. *Constat profecto ad salutem civium vitamque omnium beatam conditas esse leges* (says Cicero): *Ex quo intelligi par est eos qui perniciofa populis jussa descripserint, quodvis potius tulisse quam leges;* in his two excellent Books, *De Legibus*, which have, indeed, given the first Light to all things, almost, which our Divines and Lawyers have said well on this Subject. I will add

The Justices Case. 35

add St. *Augustine*, and turn to
no more: *Mihi lex esse non
videtur quæ iusta non fuerit; De
Lib. Arb. l. i. c. 5.*

After these Testimonies, it
is yet needful I explain the
thing a little more, for which
I bring them. When I say,
therefore, That a Command
or Law made against *Charity*,
Righteousness, the *Publick Good*,
is *No Law*; I understand not,
but that any *Bill* which passes
the *Houses*, and the *King*, is a
Law, or *Statute* of the *Realm*;
that is, a *Law* in *Foro Humano*,
in *Mans Court*, or at the *Bar* in
Westminster; and if any *Justice*
will Execute it, the *Outward*
Man,

Man is bound; because the Transgressor must suffer, and the Subject never. *Resist*; But it is not a *Law* in *Foro Interiori*, in the *Court of God*, making the thing a *Duty*; so as that to omit it, is *Sin* in the sight of *Heaven*, which is the Essential Property of a *Law*, (supposing it Good), and that which we must understand by *Obliging the Conscience*.

The *Conscience* of *Man* can be subject only to *God*. The *Magistrate* is His *Minister for Our Good*. A *Law* made then against the *Common Good*, hath none of *God's Authority*, and if it have *Man's* only, and none

none of God's, the *Outward Man* (I say) is, the *Conscience* can be under no Obligation by it.

The Truth is, There can be no bottom for a Conscientious tender *Justice*, to set his Foot upon, till he comes to this. I will repeat it in Words, which I have considered, and once put in another Book; That, *Forasmuch as God hath entrusted no Authority with any to give Laws, but for the Peoples welfare (which is the Reason of all Law), there are no Men in a Capacity of Law-givers (especially a Parliament that represent the People) but are to be supposed to intend this Bonum*
E Pub-

38 *The Justices Case.*

Publicum: And consequently, if a Law prove otherwise, or is against the Common Good; it must be supposed, also, That such a Law is devoid of their intention, or is not according to their Will; and so does not bind the Conscience, even upon a double ground; both because it is destitute of the Authority it should have from God, and its Authority from the Will of Man also, upon the account already given.

If any Man now rise up again, with a Bat who shall be Judge? he may return to his Seat, unless he choose to be Bruit; seeing every Man (according to the Religion of
Pro-

Protestants) must be allowed a Judgment of *Private Discretion* to be his Guide, in all which himself acts: And if, when a thing is commanded him, he must judge, whether it be agreeable to *God's Word* (which is so much harder), how much rather, whether it be agreeable to *Right Reason* (which is the Law of Nature) and the *Common Good*?

There were two *Laws* made in the latter Long-Parliament, One about *Burying in Woollen*, and the Other about *Waggons*; Neither of which were at first regarded: But the *Woollen Act* being found good for the *Pub-*
E 2 *lick,*

lick, was renewed, and is observed; but the Other not being so, is neglected; that is, as to the *number of Horses*, very frequently; but as to the *breadth of the Wheels*, altogether. I ask now, Whether the *Waggoner*, that makes no Conscience how many *Horses* he puts in his *Waggon*, no more than of the dimension of his *Wheels*, and breaks this *Law*, does sin in it? If he does, seeing he does it every day, and continues without amendment, how can he be Saved? If it be no Sin, because the *Common Good* supercedes the *Law*; I ask, Who then is *Judge*, whether this *Law* be for the Publick Good,

The Justices Case. 41

Good, or not? It is plain, the Man himself finds the Inconvenience of it, and he judges what is good for his *Waggon*, and can do it better than they that *Passed* the *Act*; and so orders his matters accordingly. Suppose then, an *Informer* comes to the *Justice*, and Swears against him; the *Justice* may Punish him if he will; but he, judging it no ways conducive to the *Publick Advantage*, as well as the *Waggoner* (at least, not so much as can countervail the private damage of the Poor Man), lets him go. Here the *Justice of Peace* does judge of the *Law*, in regard to his *Execution* of it; and the *Waggoner*

in regard to his Obeying of It: that is, They both judge as to their *own Parts*, using only that *Judgment of Discretion* which every Man (as a Reasonable Creature and Christian) is to Exercise, in regard to his *own Acts*; and neither of them, I suppose, conscious to themselves of any Sin in the doing, notwithstanding the *Justice's Oath*.

If any say, This Doctrine will open a door to Licentious Persons, to Transgress the *Laws* at their pleasure, and do hurt; I must answer, They are mistaken; because this Doctrine does concern the *Conscientious* only

only, and can serve no other purpose. If these will receive Good by it, it is no matter for *Wicked* and *Licentious Men*, (*For whom, as the Apostle says, and not for the Righteous, the Law is made*) seeing they are such, we know, who never observe any Law for *Conscience-sake*, but for *fear of Wrath*; and the case must be all alike with them. This is a Doctrine, indeed, which *Makes much* for the Tender: but it *Marrs nothing* with Others, in regard to this point of the Obligation of *Humane Laws*. It is the Magistrates Sword, it is the Penalty only, that keeps the *Lawless* in order; and God hath put

put Fear into the Heart of Man,
to be the Instrument by which
his *Vicegerents* Govern the
World.

And now, having stated the
Case I took in hand, as near as
I can to my Mind, I will sup-
pose, the most of such *Gentlemen*, who are in *Commission*
for the *Peace* (if they may
choose), would be willing to
live quiet with their Neigh-
bours; and if they may enjoy
Their own Consciences, be loath
to vex others about *Theirs*;
but yet, That there are some of
another Make, who either out
of *Hatred* to the *Conventiclers*,
or *Zeal* for the *Church*, or *Sense*
of

of their Office, or Instigation of Others, or put upon it by some Informer, are still for the Executing the Law against the Dissenting Meeter: I must therefore, take upon me to argue a little with the Justice of this sort, and ask him two Questions; What a Conventicle is? and, In what Manner he will proceed?

For the former, The Act against Conventicles declares against all Assembling under Colour or Pretence of any Exercise of Religion, in other manner than according to the Liturgy and Practice of the Church of England; And the Oxford Act describeth

scribeth such Meetings as, under Colour of any Exercise of Religion, are contrary to the Laws and Statutes of the Kingdom. It is not all Meetings then of above Four, that are not of the same Family, to perform a Religious Exercise, are *Conventicles*; but such as can be proved to be in other manner than according to the Liturgy and Practice of the Church; or, are contrary to the Laws of the Kingdom. The Church and Law now of England, does own the Word of God, and Gods Word commandeth Religious Exercises at home and abroad, as well as Church-Worship. Christ Prayed and Preach-

ed on Mountains, in Houses, in Ships; and so did his Disciples. *Cornelius* called together his *Kinsfolks* and *Friends* to hear *Peter*. The Apostle commands, *To Exhort one another daily, and to consider one another to provoke to good Works.* The Thirteenth Canon requires all *Persons to Celebrate the Lords Day*, not only by *Publick*, but *Private Prayer*, *Confessing their Sins*, *Reconciling themselves Charitably to their Neighbours*, and using all *Godly Conversation.* *Queen Elizabeths Injunctions, 1559.* allows a *Minister at all times, when necessity requires, to comfort his Flock with the lively Word of God,* which

which is the stay of Man's Conscience. Moreover, The Church hath appointed the *Psalms* in *Metre*, for Private Houses, Forms of Prayer, bound up with the *Bible*, the *Practice of Piety*, *Novel's Catechism*, *Jewel Works*, to be kept in every Parish, where more than Four may Read them. If more than Four or Forty meet to Feast together, the Church and *Liturgy* forbids them not to give Thanks for their Meat, no, nor to Pray, or read the *Scripture*, or a *Licensed Book*, or Sing a *Psalm*, if they will, at the end of their Supper. If any one then shall go to turn the *Law* and Church against God, by threatening
Godly

Godly Persons for doing these things, and would seduce the Justice to Prosecute them for it, with Mulcts and Imprisonment, let the Accusation be heard. Is it for the *meer number* of such that meet, that they must be made Criminal, or for the *Faultiness of the Thing* that they meet about? It cannot be for the *meer number*, because there are more allowed to meet at a *Play-House*, a *Sessions-House*, an *Exchange*, at an *Horse-Race*, a *Cock-Match*, a *Bull-Baiting*, a *Bear-Baiting*, an *Hunting*, an *Execution*, in the *Street*, in a *Ship*. It must be the *unlawful Exercise*, then, must make it a Crime, or nothing; for to law-
F
ful

ful Exercises no Limits are set. And what, I pray, then is that? If it be only reading *God's Word* to more than Four, besides the Family; that is not unlawful; nor a *Licensed Book*; no, nor *Repeating a Sermon*; for, where does the *Law* or *Liturgy* forbid either of them? If Men *Meet to call themselves a distinct Church, and to form Rules of Discipline, and Impeach the Government or Liturgy*; This indeed, the Canon forbids, and makes it the Character of a *Conventicle*, and so expounds the *Name*. Tutors may *Catechize* more at once than Four; and more than Four may joyn in Prayer: If a *God-Father* have Four and
Four

Four God-Children, may he not, after they are Sixteen Years of Age, Exhort them together to perform their Vow, which he made in their Name at *Baptism*? May not more than Four together give *God* Thanks at a Table? More than Four Travel together, or Visit; and are they forbidden Religious Conference, to Edifie one another? Should the *Church* or *Law* forbid this, what were the *Church* but an *Anti-Church*, and the *Law* the *Devil's Militia*, to Fight against Piety, and Mens Salvation?

Well then, The *Church* and *Law* not forbidding, but allowing these things, I come, in the

next place, to inquire how the *Justice* will proceed; for I will conceive him to be a Man of Temper, who acts with Prudence and Righteousness, with Care and Conscience in what he does.

If any Witness will Swear only in general, That above *Four met for Religious Exercises, in other manner than the Church and Law alloweth*; either they must Swear also what that *unlawful Exercise* was, or they do not. If not, the Liberties of *English-Men* are brought to a fine pass, when two Persons, that list, may take them away, and undo Folks at their Will.

Is it thus, besides, in all the Courts of *Justice*? Do they Hang Men as *Felons*, when any will but Swear that they are *Felons*, and never tell what they Stole, nor from whom? Will the Lords Condemn a Peer for Treason, if two will Swear that he spake Treason, and never tell what Words he spake? Will the *Church* excommunicate a Man, if two will Swear that he is a Murderer, but cannot tell of any body he Murdered? *Turks* and *Heathens* abhor such doings, as we abhor *Toads* and *Snakes*. If they Swear what the unlawful Exercise was, it is supposed they are but *Witnesses* and *Accusers*, and not the *Judges*.

54 *The Iustices Case.*

If every Woman or Beggar, that can but Swear, does become a *Judge*, whether the Religious Acts of Lords, Knights, Minister and People, be according to the *Law* and *Church*, or not, when they know not what the *Law* and *Church* is; it were far better be among *Serpents* and *Tygers*, than for People to have their Estates and Lives at the Will of such Persons: for, who dare then displease any Beggar, Rogue, or Servant? It is not the *Accuser*, therefore, but the *Iustice* is *Judge*; and he must Examine the Witness, (seeing else he must become but a *Register* or *Executioner*), and that must be of two things;
What

What the *unlawful Exercise* was?
(as is already Suggested) and
how the Witness knoweth it?

He must examine first, *What*
the unlawful Exercise was? If
they say now, There was a
Meeting, and plead Notoriety
of Fact: So is there at a *Play*,
at a *Market*, in a *Ship*, and o-
ther such greater Meetings, as
are before-named. If they say,
There was Notoriety of a *Reli-*
gious Meeting: So is there in
all *Church-Meetings*, in Meet-
ings only for House-Prayer,
Holy Conference, Grace at Ta-
ble, and the like, not forbidden;
which are also before touched.
At *Doctors - Commons* they do
meet

meet about. Admonishing, Excommunicating, Absolving, and these are certainly *Religious Exercises*, of Grand Importance; and yet performed without reading *Common-Prayer*. Either the Crime that Men are Accused for, is *Omission* of something *required*; or *Commission* of something *forbidden*. The *Omission* of the *Liturgy* cannot here be Criminal, because the reading *That*, is required in *Church Worship*; but it is not imposed on *Private Persons*, and *Places*, *Families*, *Converse*, or *Occasional Meetings*: And there is no Crime of *Commission*, because neither the bare number of Men, nor any of these Exercises.

eises before-named, (and supposed only here used), are forbidden. If they say, That the *Law* forbids not above Four to be at a Play, a Tavern, a Feast; but it forbids all above Four, of another House, to be at any Religious Meeting, it is a Slander; for the *Law* never forbid more than Four to be at *Any Religious Exercise*, but *Forbidden Exercises*, which differ from the *Church Liturgy and Practice*; which none of the fore-mentioned Exercises do.

The other thing the Witness must be Examined upon, is, *How they know the Accusation to be true?* And if it be Omission

on of the *Liturgy*, that they Swear, they must Swear they were present from first to last, else they cannot Swear, that it was not Read; and Men must not be Judged and Ruined upon Presumptions and Opinions of others, without Proof: If *part* of the *Liturgy* is said to be omitted, (even in *Church*) they must Swear *which Part*. But if they be Crimes of *Commission* that are Sworn, the Words and Deeds must be recited, with all that is Integral to the Sense, before any Judgment can be given. It is against all Humanity, Law, or Reason, that any Man should be refused to speak for himself, and

and see his Accusers Face to Face; and know what they are, and have leave to put Interrogatories to them. If you reply, That Leave to know the Accusers and Witness, will hazard and discourage them, and Leave to plead for ones Self, it may frustrate all, both Judgment and Execution. I answer, If indeed you stick there, you are not the Man I took you for, that is, no fair Man; and if that be the Rule you would go by, I will tell you, there is a nearer way than yours yet: Never stand troubling us, or your self with *Laws, Courts, Judge, or Witnesses*; but take all Mens Goods and Money that you have

have a mind to, or Imprison or Hang up any Man that you will, without giving any Reason or account for it. It will be considerable Clemency to a Man to let him Dye as Innocent, and escape the Infamy of Accusation. *Jesus Christ* and his Apostles had not so much *Justice*.

These are things that the *Justice*, who is of the Prosecuting Perswasion, is to think upon; and if he be a *London Justice*, there is one thing more to be put to him. There are at least a Hundred, or two Hundred Thousand Souls in the great Parishes, in and about
Lon-

London, more than can hear in the Churches: I ask him now, Would you have all, or half these Persons to live as Atheists, and Worship *God* in no manner at all, in any Congregation, or would you not? If you would not, Why do you Prosecute them for going to Private Meetings, when they cannot come to the Publick, in their own *Church*, which will not hold them? If you would, I desire, *Sir*, then very fairly to have done with you; for it were better to have to do with a *Mahometan*, than with a *Christian* of such a Mind.

G After

After this, I must return to the state of our Case, to touch it again in the main Point. If any Law of *Man* be inconsistent with *God's Will*, either manifestly by the Light of *Nature*, or *Scripture*, such a Law should not have passed by the *Law-giver*, and is not to be Executed by the Inferior *Magistrate*, or observed by the *People*; But if the Matter of a Law be such as is of an indifferent Nature, and, all Circumstances considered, it does appear doubtful and difficult to us, what we are to do: There is some Rule to be laid down, on necessity, to walk by, or we are at a loss. Now as *God* hath given us a *Rule*

The Justices Case. 63

Matters of *Religion*, which is the *Scripture*, by which we are to judge and try what is to be Believed and Practised therein; and every Man's own Private Judgment or Conscience must be the Discerner of it: And as in *Moral* things He hath given us the Dictates of *Reason* for our Rule: So in Matters that are *Political*, hath He given us our Rule or Test also, which is the *Publick Utility*, (for the Apostle, speaking of) the Higher Powers, that give *Laws*, or Supreme Ruler, does tell us, That he is the *Minister of God for our Good*, (as I have noted); and Man being a Creature endued with Discernment, by his Rational

G 2

64 *The Justices Case.*

nal Faculties, he is to attend, and compare such things with that Rule; And as they agree, or not agree thereunto, he is to *Pass* to *Execute*, to *Obe*y a Law, or *Not* to do it, accordingly. This is a Truth, I am perswaded, or Light, that I have struck out of the Collision of many Thoughts; and do propose it therefore, as Tasted, Clear, Fixed, and Established, to Others. When a thing now (to proceed upon it) is really against the *Common Good*, or a Man so judges (his Judgment not being the *Rule* itself, but the *Discerner* of it), such a thing (at least, to that Man) is never to be thought to have the *Authority of God* (as that
Reli-

The Justices Case. . 65

Religion hath none of it, which hath not Foundation in *Scripture*, nor indeed the *Intent of Man* (this *Publick Utility* being the scope of the *Law-giver*, or which ought to be in all his *Laws*) as hath been before signified and settled; And consequently, whether it *Be*, or *be Not* so, (as whether it *Be* (more predominantly) or *Not* agreeable to *God's Word*) is, for the most part, therefore, the chief point to be inquired into, as to the *Obligation of Conscience*, in these matters. Any Man may be *made* to do the thing for fear of *Wrath*, whether *Justice* or *People*: So that, if the *Supream Power* will have it, they must

66 *The Justices Case.*

do it, or Suffer, all Resistance being forbidden; (and as for the *Law*, it is all one whether a Man *act* out of *Conscience* or not, so long as it makes him do it): But if a Man, really in his Soul, does judge the thing Commanded to be against the *Common Good*, the *Justice* that *Executes* not that *Law*, and the *Man* that *Obeys* it not (if they can escape with Man) are not obliged for *Conscience*-sake (even, as when they think it against *God's Will*; for *God's Will*, indeed, is, that Men should Rule only for our Good), so as they need think, by that Omission, they *Sin* against *God*. I pray, note all the way, I speak still, not of what

The Justices Case. 67

is *safe* in point of *Law*, but of what is *Innocent* in point of *Conscience*. And when I allow a *Private Man* to *judge* of a *Law*, whether it be for the *Publick Good* or *not*, this is not to have a hand in determining the *Question*, Whether I am obliged or not to obey it, under the *Penalty* of the *Law*, but under the *Guilt* of *Sin* and *God's Judgment*?

Neither must I forget to distinguish from that well Studied *Divine*, *Dr. Field*, upon the *Church*, between *Subjection* and *Obedience*; and consequently, between the *not Obeying a Law*, and *Resisting of Authority*; the latter whereof is made always
Dam

Damnable by the *Apostle*; and the former is *Good* or *Evil*, or *Indifferent*, according to the *Matter* required, with consideration of the *Circumstances* a Man is in. And, though I am perswaded (as to the point of *Obedience*), that when a *Law* is unprofitable, that is, when a Man does Impartially judge the Matter Commanded, not to be conducive to Publick Benefit, (or, at least, if he truly judge the same to be against it), such a *Law* does not, such a *Law* cannot oblige the *Inner Man* (which all wholesome *Laws*, I hold, do) any farther than to avoid *Contempt* and *Scandal*: Yet do I (in the point of *Subjection*) hold

hold' and maintain, and am ready (so far as it may concern me) to declare, That I hold it *unlawful* for any Subject, or Subjects, to *take Arms* (that is, Levy War) against the *Authority* of the *King* (that is, against the Supream Executive Power, which *God* hath committed into his hands, according to the Constitution of this Realm), whether as Residing in his *Person*, or issued out from Him to any other Person or Persons, by his *Commissions*, upon any *Pretence whatsoever*. Which I do declare the rather, because I am out of doubt, that those they call *Nonconformists*, as well as the *Conformists*, who
under-

understand themselves on both sides, (however it comes to pass, that One Party of them are scrupled for want of too little Explication as this is), are perfectly reconcilable on that Point.

To conclude, The *Law* in such or such a particular Case, requires the *Justice* to act against the *Common Good*: What must he do then? I speak not of what he may *choose* to do, in point of *Prudence* (which, in case a *Law* is directly against *God's*, or so extreamly to Publick hurt, as quite over-balances our Sufferings, is not to be consulted); but of what he

he is bound to, in point of Conscience: And every one, I think, will give this Answer, That the *Superiour Law* must have still the *Preheminence*, unless there be something particularly to be alledged, in regard to that Matter; which is not exceptionable in the Case, if it be against *God's Word*. He must himself judge in reference to his own *Act*, or he acts as a *Beast*, and *Punishes* as an *Horse strikes*. And he is also the *Minister of God*, under the *King*, for the *Peoples Good*. This is the very End Of *Magistracy* it self, Of the *Laws*, Of the *Execution*. Consequently, the *Common Good*, *Salus Populi*, being the

The Justice Case.

the Supream Law; whoſoever
he be that ſincerely ſeeks That
whether he *Executes* or *For*
fears a Statute, he is, he muſt
be, in the Forbearance or Exe-
cution thereof, upon that ac-
count, the beſt Miniſter Of the
Laws, Of God, and Of the King
Princeps eſt Dei imago; Lex
Principis opus; Finis Legis Ju-
ſtitia; Ex Juſtitia Communis
Salus.

Deo Gloria.

F I N I S.

E R R A T A.

PAGE 9. Line 8. for *ſervis* read *ſervis*
p. 10. l. 7. for *preſent* & *percent*
p. 1. 3. for *are* & *may be* p. 17. l. 9.
ſerbid & *ſerbid.*

A, 963.